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IN THE

Supreme Court of the United States

October Term, 1957
No. 865

SOCIALIST PARTY, U. S. A., a political party, and WILLIAM BRAGG, individually and as California State Chairman of the SOCIALIST PARTY, U. S. A., on behalf of themselves and other members of the SOCIALIST PARTY, U. S. A.,

Petitioners,

vs.

FRANK M. JORDAN, as Secretary of State of the State of California,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Supreme Court of the State of California is reported at 49 Advanced California Reports (A. C.) 462, 318 P. 2d 479, and adopts the decision rendered in the companion case of *Christian Nationalist Party, et al. v. Frank M. Jordan*, reported at 49 A. C. 451, 318 P. 2d 473. The dissenting opinion is reported in 49 A. C. 462, 318 P. 2d 479, and adopts the dissenting opinion in the *Christian Nationalist Party* case in 49 A. C. 458, 318 P. 2d 476. These opinions are attached to the Petition as Appendix "A".

Question Presented.

Are the numerical standards of California Elections Code, Section 2540, for qualification of political parties desiring to participate in the primary elections so restrictive as to constitute a violation of the privileges and immunities, equal protection, or due process clauses of the Fourteenth Amendment of the Constitution of the United States?

Statute Involved.

Petitioners are challenging the validity of the portion of California Elections Code, Section 2540, establishing the following three alternative methods by which a political party can qualify for participation in the California primary elections:

> "(a) If at the last preceding gubernatorial election there was polled for any one of its candidates . . . for any office voted on throughout the State, at least 3 percent of the entire vote of the State . . .; or
>
> "(b) If on or before the one hundred Thirty-fifth day before any primary election it appears to the Secretary of State as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters, equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election, have declared their intention to affiliate with that party; or
>
> "(c) If on or before the one hundred thirty-fifth day before any primary election there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial

election, declaring that they represent a proposed party, the name of which shall be stated therein, which proposed party those voters desire to have participate in that primary election. . . ."

The full text of Section 2540 is set forth in Appendix "B" of the Petition.

Statement of the Case.

On March 15, 1957, the petitioners herein, the Socialist Party, U. S. A., and members thereof, filed this action for declaratory relief in the Superior Court of the State of California in and for the County of Los Angeles against the Secretary of State of the State of California challenging the validity of Section 2540 of the California Elections Code. [R. 1-3.]

The complaint alleges that the Socialist Party, U. S. A., intends and desires to participate as a political party in future California primary and general elections and to put forth candidates for various state and federal offices, but is unable to do so because it cannot qualify under any of the subdivisions of Section 2540 of the California Elections Code. [R. 3.]

The complaint also alleges that the entire vote cast at the preceding gubernatorial election was 4,100,000 and, that the 3 percent standard of subdivision (a) of Section 2540 requires a political party to have secured 123,000 of such votes in order to qualify; that the 1 percent standard of subdivision (b) of Section 2540 requires a political party to secure 41,000 qualified voters to register publicly their political affiliations with the said party; and that the 10 percent standard of subdivision (c) of Section 2540 requires a political party to secure the signatures of

410,000 voters on a petition stating that they represent such party. [R. 5 and 6.]

The complaint further alleges that in order to obtain 41,000 registrations it is necessary to spend approximately $250,000 for newspaper, radio and other media of mass communication, that in order to obtain the necessary 410,000 signatures on a petition it is necessary to spend approximately $500,000 for payment of professional circulators and for use of the said media of mass communication, and that petitioners are unable to secure such funds. It is also alleged that in the present climate of public opinion, it is impossible to secure over 40,000 Californians to publicly associate themselves with a minority political party whose political views are left of center. [R. 6.]

Based upon the foregoing reasons, the complaint charges that subdivisions (a), (b) and (c) of Section 2540 are arbitrary and unreasonable and therefore violate the California Constitution and the First and Fourteenth Amendments of the Constitution of the United States.

Respondent demurred to the Complaint on the ground that it did not state facts sufficient to constitute a cause of action. [R. 39.]

The trial court sustained the demurrer and entered a judgment of dismissal. [R. 42-43.]

On appeal, the California Supreme Court affirmed the judgment. [R. 72.] Petitioner's petition for rehearing was denied. [R. 76.]

ARGUMENT.

The issue in the present case is uniquely narrow, and concerns only the reasonableness of the standards in California Elections Code, Section 2540, defining the required numerical strength of a political party qualified to participate in the primary elections in the State of California. The authority of the State Legislature to adopt reasonable tests and conditions upon which electors, political parties, or organizations of electors may participate in any primary election is found in Section 2½, Article II of the California Constitution.*

I.

The Sole Issue Is Whether the Precise Percentages Prescribed in Elections Code, Section 2540, Are Reasonable.

Petitioners have not, and do not, contend that the Legislature of the State of California is without authority to enact minimum numerical standards for political parties desiring to participate in the primary elections, nor that such standards are not necessary to the establishment of a workable primary election system. They do not contend that the standards of Elections Code, Section 2540,

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*Section 2½ of Article II of the California Constitution provides, in part:

"The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary election shall be mandatory and obligatory."

based upon prescribed percentages of the entire vote of the State at the preceding gubernatorial election is not a reasonable and appropriate means of measuring party strength, but their sole contention is that the percentages adopted therein are "too high, oppressive and restrictive". (Pet. p. 6, lines 11-15.)

Thus, there is no disagreement as to the following:

(1) The right to participate in primary elections is an important one.

(2) The establishment of minimum numerical standards for political parties is *necessary* to the functioning of any workable primary election system.

(3) The *method* of determining numerical strength adopted in Section 2540 is a reasonable one.

The petitioners and respondent differ only with respect to the issue of whether the precise percentages prescribed by the Legislature in Section 2540 are reasonable and appropriate to achieve a legitimate legislative purpose.

II.

The Legislative Purpose of the Percentage Restrictions of Elections Code, Section 2540, Is to Assure All California Voters a Workable Primary Election System.

The Supreme Court of the State of California succinctly outlined the purpose of Article II, Section 2½ of the California Constitution, pursuant to which the Legislature enacted Section 2540, as follows:

> ". . . In general, the purpose of the amendment was to give the Legislature a free hand in eliminating existing evils by providing for the direct nomination of candidates through an efficient primary election

system in which the integrity of parties would be preserved. (See Communist Party v. Peek, 20 Cal. 2d 536, 552-553 [127 P. 2d 889]; Schostag v. Cator, 151 Cal. 600, 605 [91 P. 502].) . . .

"Percentage restrictions on the right to participate in primary elections exist in the large majority of the states (see Note (1948) 57 Yale L. J. 1276), and they have long been recognized as proper in California. In Katz v. Fitzgerald (1907), 152 Cal. 433 [93 P. 112], the court held that such a restriction was reasonable, stating, at page 436, 'Some classification is made necessary, else any two, three, or four men might call themselves a party and impose the burden of placing the names of their candidates upon the ballot provided by the state law—a condition which could easily be made intolerable to the state as well as to the voter.' (In accord, Socialist Party v. Uhl (1909), 155 Cal. 776 [103 P. 181].)" (*Christian Nationalist Party v. Jordan*, 49 A. C. 451, 455-456.)

Thus, in establishing the percentages in Section 2540 the Legislature had to strike a balance between two conflicting and equally important interests:

(1) The right of political parties, and members thereof, to participate in the primary election and (2) the right of all voters to have an efficient, accurate, and workable primary election system.

In prescribing numerical tests with respect to the minimum qualifications for groups desiring to participate in the primary elections, the Legislature had to consider the interrelated elements of time, accuracy, efficiency, and costs and the manner in which these elements are affected by a multiplicity of political parties.

Even the mere preparation of separate official ballots for each political party is not a simple process. The names of the qualified candidates for the nomination for each political party must be ascertained with respect to the state-wide offices, the 80 assembly offices, the 20 state senatorial offices,* and the 30 congressional offices to be voted upon at each direct primary election. (Elections Code, Secs. 2600 and 2628.) Each such party candidate may seek the nomination of any other party, and upon the payment of the necessary fee can have his name appear on other party ballots. (Elections Code, Sec. 2674.) Even as to each political party different types of ballots must be prepared for voters residing in different assembly, congressional, or state senatorial districts.

To insure proper distribution of ballots to the voting precincts, the registration for each party for each precinct must be computed. (Elections Code, Sec. 3712.) In 1956 there were 24,984 voting precincts in California. (*Christian Nationalist Party v. Jordan* (1957), 49 A. C. 451, 457.)

The computation of party registration at each precinct cannot be accomplished until after the 53rd day prior to the primary election, since this is the last day on which a voter may register or transfer his registration. (Elections Code, Sec. 122.) Within 15 days thereafter the County Clerk is required to arrange the original affidavits of registration in alphabetical order for each precinct and to bind them. (Elections Code, Sec. 331.)

Not more than twenty-five nor less than five days before the primary election, one sample ballot of the party to

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*Twenty of the forty State Senators are elected at each General Election (Art. IV, Sec. 5, Constitution of the State of California)

which a voter belongs must be mailed to each voter entitled to vote at the said election. (Elections Code, Sec. 3709.)

At each voting precinct the precinct board must have available for each voter the official ballot for his party and an additional number of ballots for absentee and emergency purposes (Elections Code, Sec. 3712), and the ballot clerks are required to account for each and every ballot of each and every party that has been cast, spoiled, or unused. (Elections Code, Sec. 5728.) The ballots for each political party must be separately handled, counted, tallied, certified, and reported.

It is obvious that the efficiency of the operation of the primary election system varies inversely with the number of parties participating in the said election. The greater the number of parties participating in a primary election, the greater the number of names of cross-filing candidates appearing on each party ballot, and the greater the amount of time required for voting and for counting, tallying, certifying, and reporting the votes for each party. As the variety of party ballots increases, the greater time required: to prepare and distribute sample and official ballots, to ascertain the number of party registrants for each precinct, to account for the ballots of each party at each precinct, to process each voter, and to count, tally, certify, and report the votes cast for all parties. The more numerous the names of candidates on a party ballot and the more numerous the variety of party ballots, the greater the possibility for error in the preparation and distribution of ballots and in voting, counting, tallying and reporting.

In providing the citizens of this state with a *more efficient primary election system*, the Legislature was en-

titled to take into consideration the elements of time, accuracy, and efficiency, as well as costs, and even to exclude from participation in the primary elections those political parties representing groups which are insubstantial in number. (*Communist Party v. Peek, supra* (1942), 20 Cal. 2d 536, 553.) To accomplish this objective the Legislature enacted Section 2540.

III.

Measured by the Compelling Legislative Purpose the Percentages Established by Elections Code, Section 2540, Are Reasonable.

The precise percentages to be applied to the three alternative tests in Section 2540 to effectuate the legislative purpose of assuring an efficient, workable primary election system is a subject matter upon which minds of reasonable men may differ.

Statutes enacted in twenty-four other states prescribing tests similar to the 3 percent test in Subdivision (a) of Section 2540 establish the percentages from one-half of 1 percent to 25 percent, with one state requiring one-half of 1 percent of the votes cast at the last general election, two states requiring 1 percent, four states requiring 2 percent, three states requiring 3 percent, four states requiring 5 percent, six states requiring 10 percent, one state requiring 15 percent, three states requiring 20 percent and one state requiring 25 percent of the votes cast at the last presidential election. (57 Yale Law Journal (1948), pp. 1276, 1277, "Legal Obstacles to Minority Party Success".)

On the other hand, the American Civil Liberties Union, in its model election law, has suggested a maximum of 1/10th of one percent of the last total vote for governor.* (Despite the fact that this suggested test is also based upon the vote cast in a former election, the Brief *Amicus Curiae* of the American Civil Liberties Union of Southern California filed herein urges that

> "The tests in the California Elections Code do not commend themselves for immediate acceptance. The vote cast in a former election—is scarcely a sound test for denying a present right." (P. 7.)

In discussing the precise percentages adopted in Section 2540, the California Supreme Court stated as follows:

> "The number of citizens which constitutes a substantial group for purposes of an election law is not, of course, an absolute matter but a relative one which is to be measured in the light of the size of the entire voting population. Otherwise, a statute of the type before us would soon prove ineffective in a state which, like ours, is experiencing rapid growth. The standards for qualification in section 2540, being stated in percentages of the total vote, are designed to respond to fluctuations in the size of the electorate, and they are set forth in the form of alternatives, so that provision is made for established parties, regardless of prior success, as well as for entirely new political groups.
>
> "Under subdivision (a), a party which participated in the last gubernatorial election may qualify, notwith-

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*American Civil Liberties Union, Minority Parties on the Ballot (1943), pp. 12, 15; 57 Yale Law Journal (1948), p. 1280, "Legal Obstacles to Minority Party Success".

standing the fact that up to 97 per cent of the electorate may have rejected its candidates. A party which was even less successful than necessary to meet the lenient three per cent requirement of that subdivision or one which did not participate in the election is not barred from entering the forthcoming primary election but may take advantage of subdivision (b), should its program convince persons amounting to only one per cent of the 1954 vote (41,000 electors) to register as members. The ease with which subdivision (b) may be satisfied is demonstrated by the fact that, in 1956, when there were 24,984 voting precincts in the state, a party having an average registration of less than two voters per precinct could qualify. Yet, satisfaction of this moderate registration requirement is not essential to qualification because, alternatively, a party may come within the terms of subdivision (c), by filing a petition signed by voters who are equivalent in number to 10 per cent of the earlier vote and who, without being required to become members, are willing to state that they represent the party and desire to have it participate in the 1958 primary election." (*Christian Nationalist Party v. Jordan,* 49 A. C. 451, 456-457.)

It is respectfully submitted that the percentages established by Elections Code, Section 2540, as measured by the important legislative purpose of securing to all voters an efficient workable primary election system, most assuredly are not unreasonable.

IV.

The Percentages Prescribed in Elections Code, Section 2540, Are Reasonable and Hence Do Not Violate the Constitution of the United States.

No one, not even the petitioners, can contend that some numerical limitations is not absolutely necessary for a workable primary election system, and the only contention of the petitioners is that the standards in California are "too high, oppressive and restrictive". (Pet. p. 6, lines 11-15.) Upon this contention rests petitioners' assertion that Section 2540 abridges a privilege and immunity of United States citizenship, deprives them of liberty without due process of law, and denies to them the equal protection of the law.

The numerical standards of Section 2540, however, are applicable to all political parties seeking to participate in the primary election, irrespective of their financial ability, political platform, or any other consideration.

Petitioners' argument with respect to their lack of financial ability was discussed by the California Supreme Court as follows:

> "It is true, of course, that a presently insubstantial group may be required to make expenditures in seeking qualification, but any numerical test would have the same effect. The statute does not impose any financial requirement but only restrictions based on numerical data, and the circumstance that every group calling itself a party may not be able to obtain funds which it estimates would enable it to win the necessary support among the voters of the state does not show that the restrictions are not reasonably designed to advance a vital public purpose. The right to participate in primary elections is an important one, and it

> is precisely that fact which justifies the enactment of measures designed to establish a workable primary election system so that the public may exercise the right effectively. To that end, the exclusion of insubstantial groups is proper, and, in our opinion, section 2540, when taken as a whole, does not exclude any substantial party."* (*Christian Nationalist Party v. Jordan,* 49 A. C. 451, 457.)

Moreover, not only does Section 2540 prescribe no financial requirement, other provisions of the California Elections Code expressly provide that no fees may be charged for the registration of voters or for certificates of registration. (Elections Code, Sec. 138.)

Since the classification established by Section 2540 is one of numbers alone, and applicable to all political parties, we respectfully submit that there is no denial of equal protection.

In *MacDougall v. Green* (1948), 335 U. S. 281, 69 S. Ct. 1, wherein an Illinois statute concerning qualification of political parties was under consideration, this Honorable Court stated as follows:

> ". . . It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure

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*"A candidate of a party which is excluded from a primary election may nevertheless be elected to office. He is not only eligible to receive write-in votes at the general election (Elec. Code §5710) but may have his name printed on the general election ballot with the designation 'Independent,' if, subsequent to the primary election, nomination papers are filed on his behalf by voters in the area involved who did not participate in the primary election and who number at least five per cent of the entire vote cast in that area at the preceding general election (Elec. Code, §§3040, 3041, 3815)."

a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States." (335 U. S. 281, 284, 60 S. Ct. 1, 2.)

The rationale of the *MacDougall* case is especially appropriate to the present case, for the following reasons:

(1) The legislative purpose of the challenged statute—to provide the voters with an efficient workable primary election system—is of vital concern to the State of California;

(2) The petitioners have not contended that the state is without power to enact legislation to advance this purpose, nor that the method adopted by the Legislature was not a reasonable means to achieve this purpose, but petitioners sole objection is that the percentages adopted are too high, oppressive and restrictive.

(3) In selecting the precise percentages in Section 2540 the Legislature had to strike a balance between the conflicting and important interests, both relating to the right of suffrage.

(4) The classification established by Section 2540 is one of numbers alone, hence there is no issue of discrimination nor equal protection of the laws, and the only real issue is the reasonableness of the percentages established therein.

(5) The determination of reasonableness depends not upon whether the percentages are established at optimum levels, but only upon whether they fall within the broad

zone within which there can be a difference of opinion among reasonable men as to the reasonableness of the said percentages.

(6) The above quoted portion (*ante* pp. 11-12) of the opinion in the *Christian Nationalist Party* case (49 A. C. 451, 456-457) clearly establishes that at the very least the said percentages fall within the broad zone of reasonableness.

We respectfully submit that numerical standards of Elections Code, Section 2540, in the light of its compelling legislative purpose of securing to all California voters an efficient workable primary election system, are reasonable, and hence do not deprive the petitioners of any rights guaranteed by the Constitution of the United States.

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Deputy Attorney General,

Counsel for Respondent.

Dated this 16th day of April, 1958.